Supreme Court, U.S.
FILED
DEC 22 1995
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No. 951023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TWENTY-THREE NINETEEN CREEKSIDE, INC.,

MICHAEL E. BALDIGO,

Petitioners,

V.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress by plain, unambiguous statutory language incorporated the 10-person and smaller small partnership exemption from the application of entity level unified audit and litigation rules into a 10-person and smaller small subchapter S corporation exclusion from 26 U.S.C. §§ 6241-6245 subchapter S corporation entity level unified audit and litigation rules, when Congress expressly wrote into 26 U.S.C. § 6244 the term of art "partnership items," including the exemption of 10-person and smaller small partnerships from the definition of the term "partnership," defined at subchapter C, 26 U.S.C. § 6231 (a)(1)?

2. Whether the Secretary is authorized by 26 U.S.C. §§ 6241-6245 to issue regulations thereunder for other than subchapter S corporations larger than 10 shareholders and is thereby prohibited from issuing regulations to limit the tax years after 1982 for which the express statutory 10-person and smaller small subchapter S corporation exemption is applicable?

3. Whether the Secretary is authorized to issue regulations invalidating the express statutory provision in 26 U.S.C. § 6231(a)(7) that recognizes the *de facto* selection as a tax matters partner by the Secretary of a person other than a partner having the largest profits interest in the partnership and whether that *de facto* selection by the Secretary requires, in accordance with 26 U.S.C. § 6229(b)(1) and 26 C.F.R. §301.6229(b)-1T, specific written authorization by the partnership

for a person other than the selected *de facto* tax matters person to consent to the extension of the period of limitations for making assessments?

CORPORATE AFFILIATES

Twenty-Three Nineteen Creekside, Inc. has no parent companies and has no subsidiary companies.

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2. The Secretary treats Alvis M. Rushton as the Tax Matters Person for 2319 Creekside for 1984 and 1985, and Petitioner Baldigo, an outside accountant to 2319 Creekside after October 1, 1984, was not authorized by 2319 Creekside, in accordance with 26 C.F.R. § 301.6229(b)-1T, to extend by agreement the period of limitations for making assessments on the small subchapter S corporation. 15

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(1) Certiorari should be granted, because the decision contained in the July 7 Opinion rendered by the Ninth Circuit is directly in conflict with the Fifth Circuit decision in Arenjay Corp. v. C.I.R., 920 F.2d 269 (5th Cir. 1991). 18

A. The Fifth Circuit in Arenjay identifies the decisive place where the definition of "partnership," specified in Subchapter C, 26 U.S.C. § 6231 (a) (1) excludes 10-person and smaller small subchapter S corporations from entity level unified audit and litigation rules and confines to the level of the individual tax returns of those shareholders, respectively, audit and litigation procedures for the pass-through tax items appearing on their personal individual income tax returns. 18

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(2) Certiorari should be granted, (i) because the question of the clear 10-person and smaller small subchapter S corporation statutory exception and the attempt by the Secretary through regulation to overcome that legislated exclusion has not been settled by this Court and (ii) because the Ninth Circuit decision of July 7, 1995, as well as those of the Eleventh and Tenth Circuits cited therein, conflict with doctrines of statutory construction settled in leading precedent of this Court. 25

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

TWENTY-THREE NINETEEN CREEKSIDE, INC.,

MICHAEL E. BALDIGO,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner MICHAEL E. BALDIGO respectfully prays on behalf of himself, as

Other Than Tax Matters Person, and TWENTY-THREE NINETEEN CREEKSIDE, INC. ("2319 Creekside"), a small subchapter S corporation of fewer than 10 shareholders, that a Writ of Certiorari issue to review the July 7, 1995 opinion of the United States Court of Appeals For The Ninth Circuit.

COURT DECISIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals For The Ninth Circuit, entered July 7, 1995 (the "July 7 Opinion"), is published at 59 F.3d 130 (9th Cir. 1995) and is set forth at Page A-2 of the Appendix.

Petitioner's petition for rehearing on the July 7 Opinion was denied by the United States Court of Appeals For The Ninth Circuit on September 27, 1995. The unpublished order of the Ninth Circuit

denying that petition for rehearing is set forth at Page A-17 of the Appendix.

The United States Tax Court decisions that are the subject of the July 7 Opinion, were entered on December 27, 1990, June 12, 1991 and October 18, 1991. The Tax Court decisions of December 27, 1990 and June 12, 1991 are published at 60 TCM 1506 and 61 TCM 2914, respectively, and are set forth at Pages A-41 and A-23 of the Appendix. The Tax Court decision of October 18, 1991 is unpublished and is set forth at Page A-19 of the Appendix.

JURISDICTION

The order of the United States Court of Appeals For The Ninth Circuit, denying Petitioner's petition for rehearing on the July 7, 1995 opinion, was entered on September 27, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1),

28 U.S.C. 2101 (c) and Supreme Court Rules 13.1 and 13.3.

APPLICABLE STATUTES AND REGULATIONS (See Appendix)

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26 U.S.C. § 6229 (b)

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STATEMENT OF THE CASE

A. The Ninth Circuit in its July 7 Opinion overlooks in the term of art "partnership item," the location of the defined term "partnership," where Congress put the exception for small partnerships and, thus, by express statutory language applied the small partnership exception to 10-person and smaller small subchapter S corporations.

The July 7 Opinion properly recognizes in the panel's published opinion that Congress put the exception for small partnerships in the definition of "partnership" at 26 U.S.C. § 6231 (a)(1).

Nevertheless, however, the panel overlooks the placement by Congress of the defined term "partnership" in four (4) separate places, when Congress defined "partnership item" as a term of art in the definition section of subchapter C at 26 U.S.C. § 6231 (a) (3).

The Ninth Circuit reveals its omission and the impact of its oversight on its conclusion in its July 7 Opinion, reached

from applying that oversight to its logical reasoning, as follows:

> "The term 'partnership item' is a term of art, defined by statute at 26 U.S.C. § 6231 (a) (3). *The term is defined so as not to include the definition of partnership, where Congress put the exception for small partnerships.* (emphasis added) Thus § 6244, which by its own terms applies only to 'partnership items,' does not apply to the small partnership exception to subchapter S corporations."
>
> Twenty-Three Nineteen Creekside, Inc. v. C.I.R., 59 F.3d 130, 133 (9th Cir. 1995). See also July 7 Opinion, at Page A-14 of the Appendix.

A careful reading of the definition of "partnership item" necessarily reveals that the term "partnership item" does include the definition of a "partnership" and by the process of logical reasoning of the above-quoted panel opinion does, indeed, apply the 10-person and smaller small partnership exception to 10-person and smaller small subchapter S corporations:

"Partnership item. The term *'partnership item'* means, with respect to a *partnership* any item required to be taken into account for the *partnership's* taxable year under any provisions of subtitle A to the extent regulations prescribed by the Secretary provide that for the purposes of this subtitle, such item is more appropriately determined at the *partnership* level than at the partner level." (emphases added)

Subchapter C, 26 U.S.C. § 6231(a)(3). See Subchapter C, at Pages A-54, A-57 and A-63 of the Appendix.

B. 1982 Congressional statutory exemption continues for 10-person and smaller small pass-through partnerships and 10-person and smaller small pass-through subchapter S corporations for tax years after 1982 the pre-1983 audit and litigation rules at the level of the individual income tax return.

1. No tax item of a 10-person and smaller small subchapter S corporation constitutes a "subchapter S item."

Congress in 1982 wrote into the definition of "partnership" at 26 U.S.C. § 6231 (a)(1)(B)(i)(I) and, thus, into the term "partnership item" the exclusion from those terms of 10-person and smaller small

partnerships to ensure that no tax item of those 10-person and smaller small partnerships would be considered a "partnership item." See 26 U.S.C. § 6231(a)(1)(B) and 26 U.S.C. § 6231(a)(3), at Subchapter C, at Pages A-56 and A-57 of the Appendix.

All tax items of a 10-person and smaller small partnership were then each defined by Congress to constitute a "non-partnership item:"

> "Nonpartnership item. The term 'nonpartnership item' means an item which is (or is treated as) not a partnership item (emphasis added)."
>
> Subchapter C, 26 U.S.C. § 6231(a)(4). See Subchapter C, at Page A-57 of the Appendix.

Similarly, by locating the term of art "partnership items" at 26 U.S.C. § 6244, qualified by the defined term "partnership" that excludes 10-person and smaller small partnerships, Congress incorporated the 10-person and smaller small partnership

exemption into a 10-person and smaller small subchapter S corporation exclusion from the subchapter S corporation entity level audit and litigation rules at 26 U.S.C. §§ 6241-6245. See 26 U.S.C. §§ 6241-6245, at Pages A-62 to A-64 of the Appendix.

Congress thus determined by plain statutory language that no tax item of a 10-person and smaller small subchapter S corporation would constitute a "subchapter S item."

2. The definition of "partnership" and the exclusion of 10-person and smaller small partnerships from that definition is central to the provisions of Subchapter C that limit the definition of "partnership items," deployed at 26 U.S.C. § 6244.

The express statutory words of 26 U.S.C. § 6244 specifically exclude for tax years after 1982 provisions relating to subchapter C "nonpartnership items" from being extended and made applicable to

"subchapter S items" and permit only those provisions that relate to "partnership items" to be so extended to and made applicable to "subchapter S items:"

> "26 U.S.C. § 6244. Certain partnership provisions made applicable.
>
> "The provisions of --
>
> (1) subchapter C which relate to
>
> (A) assessing deficiencies, and filing claims for credit or refund, with respect to partnership items, and
>
> (B) judicial determination of partnership items, and
>
> (2) so much of the other provisions of this subtitle as relate to partnership items, are (except to the extent modified or made inapplicable in regulations) hereby extended to and made applicable to subchapter S items." (emphases added).
>
> See subchapter D, Page 7 hereof and Page A-54, A-57 and A-63 of the Appendix.

The definition of "partnership" in subchapter C ("Subchapter C") is central to the provisions of Subchapter C that limit the definition of "partnership items:"

"Partnership item. The term 'partnership item' means, with respect to a partnership any item required to be taken into account for the partnership's taxable year under any provisions of subtitle A to the extent regulations prescribed by the Secretary provide that for the purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level." (emphases added)

Subchapter C, 26 U.S.C. § 6231(a)(3). See Subchapter C, at Page A-57 of the Appendix.

Congress thus defined "partnership item" in the definition section of Subchapter C to exclude 10-person and smaller small partnerships from that definition through its employment of the term "partnership":

"Partnership
"(A) In general. Except as provided in subparagraph (B) (emphasis added), the term 'partnership' means any partnership required to file a return under section 6031(a).

"(B) Exception for small partnerships.
(i) In general. The term 'partnership' shall not include any partnership if --
(I) such partnership has 10 or fewer partners (emphasis

added) each of whom is a natural person (other than a nonresident alien) or an estate, and
(II) each partner's share of each partnership item is the same as every other item.

For the purposes of the preceding sentence, a husband and wife (and their estate) shall be treated as 1 partner.

(ii) Election to have subchapter apply. A partnership (within the meaning of subparagraph (A) may for any taxable year elect to have clause (i) not apply. Such election shall apply for such taxable year and all subsequent taxable years unless revoked with the consent of the Secretary.

Subchapter C, 26 U.S.C. § 6231(a)(1). See Subchapter C, at Page A-56 of the Appendix.

C. The placement by Congress in 26 U.S.C. § 6244 of the term of art "partnership item," which clearly includes the exception for all 10-person and smaller small partnerships written by Congress in the defined term "partnership," (1) includes by express statutory language the exception for all 10-person and smaller small subchapter S corporations from the rules of 26 U.S.C. §§ 6241-6245 and all regulations issued thereunder and (2) sustains the logical reasoning embraced by the July 7 Opinion that is necessarily in accord with

and consistent with the Fifth Circuit case of Arenjay Corp. v. C.I.R., 920 F.2d 269 (5th Cir. 1991).

1. Ninth Circuit logical reasoning interpreting the plain words of 26 U.S.C. § 6244 applies the 10-person and smaller small partnership exception to subchapter S corporations.

The exercise in logical reasoning by the Ninth Circuit in its July 7 Opinion necessarily produces, through the location by Congress of the defined term "partnership" in the term of art "partnership item" at 26 U.S.C. § 6231 (a) (3), the application of the 10-person and smaller small partnership exception to the exclusion of 10-person and smaller small subchapter S corporations from entity level audit and litigation rules:

> "The term 'partnership item' is a term of art, defined by statute at 26 U.S.C. § 6231 (a) (3). *The term is defined so as not to include the definition of partnership, where Congress put the exception for small partnerships.* (emphasis added) Thus § 6244, which by its own terms applies

> only to 'partnership items,' does not apply to the small partnership exception to subchapter S corporations."
>
> Twenty-Three Nineteen Creekside, Inc. v. C.I.R., supra, at 133. See also July 7 Opinion, at Page A-14 of the Appendix.

The exception for 10-person and smaller small subchapter S corporations that Congress placed in 26 U.S.C. § 6244, where it deployed the term of art "partnership items," qualified by the defined term "partnership," affects the July 7 Opinion wherever that panel opinion relies on statutory provisions or on regulations that themselves rely on the definition of "partnership," where Congress put the exception for 10-person and smaller small partnerships from entity level audit and litigation rules.

D. Petitioner Baldigo's individual income tax return for the year 1984 contains thereon pass-through tax items from the pass-through business activities of 2319

Creekside, and these tax items are not subject to audit or litigation at the entity level of 2319 Creekside, a small subchapter S corporation of less than 10 shareholders.

1. Petitioner Baldigo transfers 100% of the shares of his small subchapter S corporation to Alvis M. Rushton on October 1, 1984 and thereafter acts only as an outside accountant to 2319 Creekside.

Petitioner Baldigo on October 1, 1984 transferred 100% of the ownership of 2319 Creekside to Alvis M. Rushton. See Page A-43 of the Appendix.

Thereafter, Petitioner Baldigo's sole relationship with 2319 Creekside was acting as an outside accountant to the corporation.

2. The Secretary treats Alvis M. Rushton as the Tax Matters Person for 2319 Creekside for 1984 and 1985, and Petitioner Baldigo, an outside accountant to 2319 Creekside after October 1, 1984, was not authorized by 2319 Creekside, in accordance with 26 C.F.R. § 301.6229(b)-1T, to extend by agreement the period of limitations for making assessments on the small subchapter S corporation.

The Secretary treated Alvis M. Rushton as the tax matters person for 2319 Creekside (i) on the audit examinations of 2319 Creekside's fiscal years ended June 30, 1984 and 1985 and (ii) also treated Mr. Rushton as the tax matters person for the corporation in the Secretary's written agreement to extend the period of limitations for making assessments. See Page A-50 of the Appendix.

In addition, the July 7 Opinion made no finding, and the record will not support such a finding, that Petitioner Baldigo, an outside accountant to 2319 Creekside after October 1, 1984, was authorized by 2319 Creekside, as required by 26 C.F.R. § 301.6229(b)-1T, to act as an authorized representative of the small subchapter S corporation for the purpose of entering into such an agreement with the Secretary to extend the period of limitations for making such assessments.

Petitioner Baldigo has challenged the jurisdiction of the United States Tax Court in this case on the basis (1) that the corporate level audit and litigation rules do not apply to the pass-through nonsubchapter S tax items contained on his 1984 individual income tax return, (2) that he has never been a Tax Matters Person for 2319 Creekside, in the event corporate unitary rules would apply, and (3) that, in either event, the Tax Court has no jurisdiction, because the statute of limitations has run against the Respondent on the 1984 tax items on both his individual tax return of that year and the tax items of 2319 Creekside for the fiscal year for 1984. See United States Tax Court decisions of June 12, 1991 and December 27, 1990, at Pages A-23 and A-41 of the Appendix, respectively.

REASONS FOR GRANTING WRIT

(1) Certiorari should be granted, because the decision contained in the July 7 Opinion rendered by the Ninth Circuit is directly in conflict with the Fifth Circuit decision in Arenjay Corp. v. C.I.R., 920 F.2d 269 (5th Cir. 1991).

A. The Fifth Circuit in Arenjay identifies the decisive place where the definition of "partnership," specified in Subchapter C, 26 U.S.C. § 6231 (a) (1) excludes 10-person and smaller small subchapter S corporations from entity level unified audit and litigation rules and confines to the level of the individual tax returns of those shareholders, respectively, audit and litigation procedures for the pass-through tax items appearing on their personal individual income tax returns.

The Fifth Circuit in Arenjay acts on its recognition that Congress chose to include the definition of the term "partnership" in the term of art "partnership item" and thereby directed that 26 U.S.C. § 6231 be made applicable to S corporations:

> "Declining the importunity of the Commissioner of Internal Revenue that we interpret a statute clear on its

face to convey a different meaning because in the Commissioner's opinion, unsupported by the record evidence, the patent reading would lead to absurd consequences, we hold that the procedural provisions of subchapter C of the Internal Revenue Code relating to partnerships apply to subchapter S corporations, and reverse the Tax Court judgment.

. . .

"Section 6231 (a) (1) (B) provides partnerships with ten or fewer partners with an exemption from audit and litigation procedures known as the 'small partnership exception.'

. . .

"Section 6231 of the statute is unambiguous. Partnerships with ten or fewer partners are exempted from the audit and litigation procedures. Congress grafted subchapter S onto the partnership provisions; § 6231 is made applicable to S corporations by § 6244. Thus S corporations are governed by the same rules applicable to partnerships. . . . Section 6231 exempts those partnerships with ten or fewer partners. By overlaying the word 'partnership' with 'S corporation,' and the word 'partner' with 'shareholder,' § 6231 provides an '[e]xception for small S *corporations* . . . . if such corporation has ten or fewer *shareholders*. . . . ' [emphasis added]." Arenjay Corp. v. C.I.R., supra, at 270-271.

The Eleventh, Tenth and now the Ninth Circuits have each failed to recognize what is clear to the Fifth Circuit in the plain, unambiguous words written by Congress into the definition of the term of art "partnership item" - that the definition refers to and is qualified by the defined term "partnership" in four (4) separate places. See Beard v. United States, 992 F.2d 1516, 1523 (11th Cir. 1993); Home of Faith v. C.I.R., 39 F.3d 263, 264 (10th Cir. 1994); Twenty-Three Nineteen Creekside, Inc. v. C.I.R., supra, at 133.

B. The legislative history of 26 U.S.C. §§ 6241-6245 is consistent with the Fifth Circuit decision in Arenjay that the entity level unified audit and litigation rules do not apply to 10-person and smaller small subchapter S corporations.

The legislative history of the Tax Equity and Fiscal Responsibility Act of 1982, adopted in September, 1982, and of

the Subchapter S Revision Act of 1982, adopted by Congress a month later in October, 1982, sustains the consistency of the Fifth Circuit decision in Arenjay that rules governing unitary entity level audit and litigation procedures do not apply to 10-person and smaller small subchapter S corporations.

The Conference agreement on the small partnership amendment included in the Tax Equity and Fiscal Responsibility Act of 1982 expressly excludes 10-person and smaller small partnerships from entity level audit and litigation rules:

> "3. **Tax Treatment of Partnership Items**.
>
> . . .
>
> i. **Small partnerships**
>
> Generally, partnerships covered by the rules include any partnership required to file a return under section 6031(a).
>
> However, the rules do not apply to partnerships consisting of 10 or fewer partners each of whom is a natural person (emphasis added) (other

than a nonresident alien) or an estate, provided that each partner's share of any partnership item is the same as his distributive share of every other partnership item. A husband and wife (and their estates) shall be treated as one partner for purpose of this exception.

A partnership eligible to be excluded under this provision may elect to be covered by the rules (emphasis added). The election is binding for the year for which it is made and subsequent years unless revoked with the Secretary's consent. Tax Equity and Fiscal Responsibility Act of 1982, Conference Report No. 97-760, 2d Session (August 17, 1982), at 608-609. See 1982-2 Internal Revenue Service Cumulative Bulletin 600, 667.

The grafting by Congress of the above 10-person and smaller small partnership exclusion from unitary entity level audit and litigation rules onto 10-person and smaller small subchapter S corporations is set forth in the Subchapter S Revision Act of 1982, passed a month after small partnerships were exempted from unitary entity level rules:

"G. Tax Administration Provisions

. . .

Explanation of Provision (secs. 6241-6245)

Under the bill, the tax treatment of items of subchapter S income, loss, deductions, and credits generally will be determined at the corporate level in a unified proceeding rather than in separate proceedings with shareholders. Shareholders will be given notice of any administrative or judicial proceeding at which such items will be determined. Further, each shareholder will be given the opportunity to participate in these proceedings. Shareholders will be required to file returns consistent with the corporate return or notify the Internal Revenue Service of the inconsistency.

The audit provisions are to generally follow the new audit provisions made applicable to partnerships by the Tax Equity and Fiscal Responsibility Act of 1982. Thus, for example, rules relating to restrictions on assessing deficiencies, periods of limitations and judicial review will follow the corresponding partnership rules (emphasis added). However, those rules may be modified by Treasury regulations where appropriate to take account of the differences (whether or not tax related) between a corporation and a partnership. For example, the selection of a person to act on behalf of the corporation in the way the tax matters person acts on behalf of a partnership must take into account that a corporation has no person to

> correspond to a general partner, as such (since the corporate shareholders are not liable for the corporation's debts, as is a general partner). As with partnerships, the regulations may treat certain corporate items as other than corporate items, for purposes of these audit rules, where special enforcement problems arise (emphasis added). Subchapter S Revision Act of 1982, Senate Report No. 97-640, 2d Session, at 25; House of Representatives Report No. 97-826, 2d Session, at 24. See 1982-2 Internal Revenue Cumulative Bulletin, 718, 729, 730, 741.

Congress, thus, in the unambiguous, plain meaning of the exception language contained in 26 U.S.C. § 6231 (a) (1) (B) (i) (I) excluded 10-person and smaller small subchapter S pass-through corporations, as well as 10-person and smaller small pass-through partnerships, from entity level unitary audit and litigation rules and continued the pre-1983 statutory procedural requirements for auditing and litigating the tax items of those pass-through entities of 10 or fewer persons only at the level of their individual tax

returns. See also Eastern States Casualty Agency v. Commissioner, 96 T.C. 773, 783 *et seq.* (1991), Whalen, J., dissenting.

(2) Certiorari should be granted, (i) because the question of the clear 10-person and smaller small subchapter S corporation statutory exception and the attempt by the Secretary through regulation to overcome that legislated exclusion has not been settled by this Court and (ii) because the Ninth Circuit decision of July 7, 1995, as well as those of the Eleventh and Tenth Circuits cited therein, conflict with doctrines of statutory construction settled in leading precedent of this Court.

The July 7 Opinion, as well as the Eleventh Circuit decision in Beard and the Tenth Circuit decision in Home of Faith cited therein, conflict with doctrines of statutory interpretation settled in leading precedent of this Court (1) that the definition of a term in the definition section of a statute controls the construction of that term whenever it appears throughout the statute and (2) that when Congress defines the language it uses,

its definitions are the end of the matter, and an administrative body does not have the power to issue regulations, temporary or otherwise, to negate statutorily-defined exemptions from regulatory conduct.

A. The temporary regulation that the Ninth Circuit panel opinion relies on (i) to reduce the small subchapter S corporation exception from the 10-person and smaller small subchapter S corporation statutory exemption to a 5-person and smaller regulatory exemption and (ii) to limit the application of the 10-person and smaller small subchapter S corporation statutory exclusion for tax years after 1982 to a regulatory application to tax years after 1987 fails to implement the congressional mandate to issue regulations pursuant to 26 U.S.C. §§ 6241-6245 only for subchapter S corporations larger than 10 persons to take account of the differences between partnerships and corporations.

A regulation is inconsistent with the congressional mandate of a statute if the regulation does not harmonize with the plain language of the statute, its origins and its purpose. National Muffler Dealers Association v. U.S., 440 U.S. 472, 477 (1979).

The primary rule of statutory construction is to give effect to the plain meaning of the language used. Where the Commissioner acts under specific authority, the primary inquiry of a court is to determine whether the plain language of the statutes examined invalidates regulations issued without harmony to defined terms placed by Congress in those statutes. Rowan Companies, Inc. v. United States, 452 U.S. 247, 252-254 (1981).

26 C.F.R. Temp. Reg. § 301.6241-1T(c), relied on by the panel's July 7 Opinion to deny 2319 Creekside it's statutorily-conferred small subchapter S corporation exemption from corporate level audit and litigation procedures, defeats the purpose of Congress (1) by attempting to reduce the statutory 10-person and smaller small subchapter S corporation exclusion to a regulatory exception of 5 or fewer shareholders and (2) to limit the appli-

cation of the statutory small subchapter S corporation exclusion from tax years after 1982 to a regulatory exception for tax years after 1987. See 26 C.F.R. Temp. Reg. § 301.6241-1T, at Page A-61 of the Appendix. See Dixon v. U.S., 381 U.S. 68, 74-75 (1965); Manhattan General Equipment Co. v. C.I.R., 297 U.S. 129, 134-135 (1936); United States v. Vogel Fertilizer Co., 455 U.S. 16, 26-32 (1982).

B. The definition of a term in the definition section of a statute controls the construction of that term whenever it appears throughout the statute, and when Congress defines the language it uses, its definitions are binding upon the court and the administrative agency restrained by the statute at hand.

This Court has held that the plain purpose of legislation is determined in the first instance in the plain language of the statute itself, and that when the statute is clear and unambiguous, the unambiguous expressed intent of Congress is the end of

the matter for the court and regulatory agency alike. Board of Governors v. Dimension Financial Corporation, 474 U.S. 361, 368, 373 (1986) (Federal Reserve Board inclusion of "nonbank banks" in the category of "bank" in its Regulation Y is outside the express statutory subject matter scope of the unambiguous words of the Congressional statutory definitions).

It is a fundamental principle of statutory construction that "the definition of a term in the definitional section of a statute controls the construction of that term whenever it appears throughout the statute." 1A Sutherland, Statutory Construction (5th Ed.) (1992), § 20.08, at 90, n. 10. See also Board of Governors v. Dimension Financial Corporation, supra, at 374; Florida Dept. of Banking & Finance v. Board of Governors, 800 F.2d 1534, 1536 (11th Cir. 1986).

For the above reasons, a writ of certiorari should issue to review the Ninth Circuit July 7 Opinion, or, in the alternative, this Court pursuant to Supreme Court Rule 16.1 should summarily reverse the July 7 Opinion and dismiss for want of jurisdiction the December 27, 1990, June 12, 1991 and October 18, 1991 United States Tax Court decisions.

Dated: December 22, 1995

Respectfully submitted,

/s/ James Reyer

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APPENDIX

OPINIONS, DECISION, ORDERS

AND

STATUTORY PROVISIONS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWENTY-THREE NINETEEN CREEKSIDE, INC.; Michael E. Baldigo,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

No. 93-70687

Appeal from the United States Tax Court (No. 2345-90)

Before REINHARDT, THOMPSON and KLEINFELD, Circuit Judges

The main issue in this case is whether tax treatment of a subchapter S corporation with five or fewer shareholders proceeds at the entity level or the shareholder level. A regulation provides for shareholder level treatment, but does not apply to the period at issue in this case. An issue of who is the "tax matters person" also arises.

I. FACTS

Twenty-three Nineteen Creekside, Inc. is a subchapter S corporation. During its fiscal year at issue in this case, ending June 30, 1984, Michael L. Baldigo owned 72% of its shares, Alvis M. Rushton owned 25% and another individual owned 3%. After the fiscal year ended, but before calendar year 1984 ended, Mr. Rushton acquired all the shares from the other two shareholders.

Near the end of the statue of limitations period, the IRS obtained from Mr. Rushton and Mr. Baldigo their signed consent to extend the time to assess tax attributable to the corporation. Then in 1989, the IRS sent a notice of final S corporation administrative adjustment, proposing to adjust the income of the corporation upward by $206,733. Identical copies of the notice of adjustment were mailed to Mr. Baldigo at various addresses the IRS had for him and to the "Tax Matters

Person" at the corporation's address.

The Internal Revenue Code provides for designation of one of the individuals associated with a partnership of subchapter S corporation as "tax matters partner" or "tax matters person." See 26 U.S.C. § 6231(a)(7); 26 U.S.C. § 6244; 26 C.F.R. § 301.6231(a)(7)-1. The tax matters person has authority to take various actions on behalf of the entity in dealings with the Internal Revenue Service. 26 U.S.C. § 6226. Mr. Baldigo took the position that he was not the "tax matters person" for the corporation.

Despite the claim that he was not the tax matters person for the corporation, Mr. Baldigo took steps to preserve the corporation's rights. Within the 90 day period prescribed by 26 U.S.C. § 6226 for petitions made by the tax matters person, Mr. Baldigo filed a petition in the Tax Court for readjustment. He claimed that

the IRS had erred in the disallowances of deductions and other determinations underlying the $206,733 adjustment. On the signature line, he signed as "Michael E. Baldigo for" the corporation. In the caption, a rubber stamp below his name says "A Person(s) Other Than the Tax Matters Person." Mr. Baldigo filed a second petition for readjustment after the 90-day period. This second petition was filed in accord with the time limits prescribed for a person other than the tax matters person to obtain review. See 26 U.S.C. § 6226(b).

Only the procedural disputes, not the amount of the tax, have been put at issue in this appeal. The Tax Court consolidated the two petitions, and decided after a hearing that Mr. Baldigo was tax matters person. The Tax Court then held that tax treatment of the corporation was properly done at the entity, rather than the shareholder, level.

II. ANALYSIS

All of the issues are questions of law, which we review de novo. Ann Jackson Family Foundation v. C.I.R., 15 F.3d 917, 920 (9th Cir. 1994).

1. Tax Matters Person

Mr. Baldigo took the position that Mr. Rushton, not he was the tax matters person. The corporation had not designated a tax matters person for its fiscal year ending June 30, 1984, the tax year at issue. Mr. Baldigo owned a majority of the shares of stock during that fiscal year, although he sold out to Mr. Rushton a few months after the fiscal year ended.

[1] The Tax Code makes the provisions for selecting a tax matters person found in the partnership section applicable to S corporations unless the Secretary changes

the rules by regulation. 26 U.S.C. § 6244. No altering regulations were written, so the partnership provisions control. Because Mr. Baldigo owned the "largest profits interest," and no other tax matters person was designated, the Tax Court properly determined that by operation of law, he was the tax matters person for the taxable year at issue. 26 U.S.C. § 6231(a)(7); 26 U.S.C. § 6244; 26 C.F.R. § 301.6231(a)(7)-1T(m)(2).

[2] Mr. Baldigo argues that he did not wish to be the tax matters person, because by October of 1984, he had sold all his interest in the Corporation to Mr. Rushton and could not be assured of being paid for the work involved. This does not matter. The corporation did not designate a tax matters person for the taxable year ending June 30, 1984, so all that mattered under the statute was that Mr. Baldigo owned "the largest profits interest," and

held that ownership "at the close of that taxable year." 26 C.F.R. § 301.6231(a)(7)-1T(m)(2). The phrase "taxable year" in the regulation refers, by the word "that" to the taxable year of the entity, not of the individuals owning interests in the entity.

> The tax matters partner *for any partnership taxable year* to which this paragraph (m) applies is the general partner having the largest profits interest in the partnership at the close of *that taxable year* . . . .

26 C.F.R. § 301.6231(a)(7)-1T(m)(2) (emphasis added). This clarifies and is consistent with the statutory reference to the "taxable year involved." 26 U.S.C. § 6231(a)(7)(B). This issue differs from the limitations question answered in Bufferd v. Commissioner, ____ U.S.___, 113 S.Ct. 927, 122 L.Ed 306 (1993). We therefore conclude that the Tax Court correctly determined that Mr. Baldigo was the tax matters person

for 2319 Creekside's 1984 fiscal year and that the petition for readjustment was properly filed by Mr. Baldigo.

2. Individual or entity level

[3] Subchapter S corporations are treated similarly for tax purposes to partnerships, but they are not the same in all respects. Mr. Baldigo and 2319 Creekside argue for the year at issue, they are entitled to tax administration at the individual rather than the entity level, like a partnership with ten or fewer partners. We affirm the Tax Court's determination that entity level administration was correct.

[4] The controlling statutes expressly grant the Secretary the power to resolve the matters at issue by regulations. The general rule, that subchapter S corporations' tax treatment is determined at the corporate level,

expressly provides for exceptions to be made by regulation:

> Except as otherwise provided in regulations prescribed by the Secretary, the tax treatment of any subchapter S item shall be determined at the corporate level.

26 U.S.C. § 6241. Likewise, the statues applying partnership tax procedures to subchapter S corporations expressly provides for modification and exception by regulation:

> **Certain partnership provisions made applicable.**
>
> The provisions of --
>
> (1) subchapter C which relate to
>
> (A) assessing deficiencies, and filing claims for credit or refund, with respect to partnership items, and
>
> (B) judicial determination of partnership items, and

(2) so much of the other provisions of this subtitle as relate to partnership items, are *(except to the extent modified or made inapplicable in regulations)* hereby extended to and made applicable to subchapter S items." (emphases added).

26 U.S.C. § 6244 (emphasis added).

[5,6] Partnerships have an exception to entity level treatment for "small partnerships" of ten or fewer partners. 26 U.S.C. § 6231(a)(1)(B). The Secretary promulgated a regulation creating a similar exception for small subchapter S corporations, with five or fewer shareholders. 26 C.F.R. § 301.6241-1T(c). The regulation, however, does not apply to the tax year at issue:

(c)(2) Exception for small S corporations - (i) Effective date.

This paragraph (c) (2) shall

apply to any taxable year of an S corporation the due date of the return for which (determined without regard to extensions) is on or after January 30, 1987.

(ii) Five or fewer shareholders. For purposes of this paragraph (c), an S corporation shall not include a small S corporation. A small S corporation is defined as an S corporation with 5 or fewer shareholders, each of whom is a natural person or an estate. . . .

26 C.F.R. § 301.6241-1T(c)(2). Thus, by its own terms, this regulation cannot benefit 2319 Creekside and Baldigo for the corporation's fiscal year ending June 30, 1984. The Secretary plainly considered earlier tax years, and decided not to apply the small subchapter S corporation to them, because subsection (a) of the same regulation provides for tax years beginning

after December 31, 1982. 26 C.F.R. § 301.6241-1T(a).

[7] Baldigo argues, based on Arenjay Corp. v. Commissioner, 920 F.2d 269 (5th Cir. 1991), that notwithstanding the fact that the regulations do not help him, the small partnership exception of section 6231(a)(1)(B) applies through section 6244 to small S corporations. The Circuits have divided on this issue. The Fifth Circuit goes one way, in Arenjay, but the Tenth and Eleventh go the other, in Home of Faith v. Commissioner, 39 F.3d 263, 264 (10th Cir. 1994), and Beard v. United States, 992 F.2d 1516, 1523 (11th Cir. 1993). We join the Tenth and Eleventh Circuits.

The Eleventh Circuit pointed out that section 6244 "does not incorporate every provision . . . which relates to partnership law. Rather it incorporates all provisions of the [law] which relate to *assessment of* partnership items, to *filing*

claims with respect to partnership items, and to the *judicial determination of* partnership items." Beard v. United States, 992 F.2d 1516, 1523 (11th Cir. 1993). Beard distinguishes between "partnership items" and the definition of a partnership. Id. " The term "partnership item" is a term of art, defined by statute at 26 U.S.C. § 6231 (a) (3). The term is defined so as not to include the definition of partnership, where Congress put the exception for small partnerships. Thus § 6244, which by its own terms applies only to "partnership items," does not apply to the small partnership exception to subchapter S corporations.

Under § 6241, Congress provided that tax determinations for S corporations would take place at the corporate level, except where the Secretary provided otherwise by regulations. Congress authorized the Secretary to change this by regulation, and

the Secretary did so, but only for tax years subsequent to the one at issue. We therefore affirm the Tax Court's determination that there is no small S corporation exception to entity level treatment of the 1984 tax year.

3. Other arguments

[8] Mr. Baldigo argues that the IRS did not pay the United States Postal Service properly for its mailing services, so should be treated as though it had not properly mailed the notice in this case. But notice was admittedly received and responded to within the ninety day period, so the claimed defect in mailing is immaterial. McKay v. Commissioner, 886 F.2d 1237, 1238 (9th Cir. 1989).

[9] Mr. Baldigo also argues that if he, not Mr. Rushton, was the tax matters person, then Mr. Rushton's stipulation as tax matters person to extend the statute of

limitations was without effect. But Mr. Baldigo signed the stipulation too, albeit as "authorized representative" below Mr. Rushton's signature as "tax matters person," so the stipulation was effective whichever of them was the tax matters person. See Bugaboo Timber Co. V. Commissioner, 101 T.C. No. 31, 1993 WL 480165 (Nov. 22, 1993).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TWENTY-THREE NINETEEN CREEKSIDE, INC.; MICHAEL E. BALDIGO,

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee

No. 93-70687

Tax Ct. No. 2345-90

ORDER

FILED
SEP 27 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: REINHARDT, THOMPSON and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the

suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES TAX COURT

Twenty-Three Nineteen Creekside, Inc., Michael E. Baldigo, Tax Matters Person,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

Docket No. 2345-90

DECISION

In accord with I.R.C. sections 6244 and 6230(1) and Rule 248(a) of the Tax Court Rules of Practice and Procedure, it is

ORDERED AND DECIDED: That the following statement shows the adjustments to the subchapter S items of Twenty-Three Nineteen Creekside, Inc. for the taxable year ended June 30, 1984:

S-Corporation Item	As Reported
Cost of Goods Sold	$ 1,264.00

Total Deductions $205,459.00

As Determined

$ 1,264.00

3,744.00

(signed) Wm. M. Fay

Judge

Entered: OCT 18 1991

It is stipulated that the Court may enter the foregoing decision pursuant to I.R.C. 6244 and 6230(1) and in accord with Tax Court Rule 248(a).

Subject to the next succeeding paragraph, it is stipulated that the Court may enter the foregoing decision pursuant to Tax Court Rule 248(a).

It is further stipulated that the undersigned Tax Matters Person of Twenty-Three Nineteen Creekside, Inc. for the taxable year ending June 30, 1984 consents to the entry of the following decision solely in order to avoid the necessity of a

trial on the merits, as to which there is no dispute, and thus to obtain a final order as a basis for appealing the decisions of the Court granting Respondent's Motion to Correct Caption and denying Petitioner's Motion for Reconsideration. The undersigned Tax Matters Person further certifies that no shareholder objects to the entry of this decision, without prejudice, however, to the right of either party to contest the correctness of the decision entered herein including specifically Petitioner's right to appeal the decisions of the Court granting Respondent's Motion to Correct Caption and denying Petitioner's Motion for Reconsideration. The parties acknowledge that Petitioner intends to appeal such issues to the Court of Appeals for the Ninth Circuit, and the execution hereof by Petitioner shall in no way be considered a waiver of such right to so appeal.

ABRAHAM N. M. SHASHY, JR.
Chief Counsel
Internal Revenue Service

/s/ Michael E. Baldigo
MICHAEL E. BALDIGO
Tax Matters Person
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Date: 9-23-91

By:/s/ Shelleyanne W. L. Chang
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Date: 9/23/91

UNITED STATES TAX COURT

Twenty-Three Nineteen Creekside, Inc., Michael E. Baldigo, Tax Matters Person, Petitioner

v.

Commissioner, Respondent.

Docket No. 2345-90

Memorandum Opinion

Filed June 12, 1991

SCOTT, Judge: This case was assigned to Special Trial Judge Buckley pursuant to the provisions of section 7443A(b) and Rules 180 et seq.[1] After a review of the record, we agree with and adopt her opinion which is set forth below.

Opinion of the Special Trial Judge

BUCKLEY, Special Trial Judge: Our

[1] All section references are to the Internal Revenue Code as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Memorandum Opinion in this matter was filed on December 27, 1990, T.C. Memo 1990-649. In that opinion, inter alia, we held that the unified audit and litigation procedures applied to the three-shareholder subchapter S corporation in the matter at bar. We now consider petitioner's request for reconsideration under Rule 161. This case was originally filed under the caption "Twenty-Three Nineteen Creekside, Inc., Michael E. Baldigo, A Person Other than the Tax Matters Person, Petitioner v. Commissioner of Internal Revenue, Respondent." We granted respondent's motion to correct caption in order to indicate that Michael E. Baldigo was the Tax Matters Person of the subchapter S corporation.

Respondent mailed the Notice of Final S Corporation Administrative Adjustment (hereafter FSAA) to various persons, including Michael E. Baldigo, in regard to

a California subchapter S corporation, Twenty-Three Nineteen Creekside, Inc. (hereafter corporation) for the corporate tax year ended June 30, 1984. During that year, there were three shareholders of the corporation, one of whom was Mr. Baldigo, who held 72 per cent interest in the corporation. In our Memorandum Opinion, we held that Mr. Baldigo was the Tax Matters Person of the corporation, and we dealt primarily with his contention that the unified audit and litigation provisions of section 6241 et seq. do not apply to a subchapter S corporation with but three shareholders.

The Subchapter S Revision Act of 1982, Pub. L. 97-354, 96 Stat. 1669, provides, inter alia, for a consideration of the tax treatment of items of subchapter S income, deductions, and credits in unified proceedings rather than in separate proceedings with shareholders. Thus,

section 6241 provides that the treatment of any subchapter S item shall be determined at the corporate level. Section 6244 provides that certain provisions of the unified partnership audit and litigation provisions are made applicable to subchapter S items, except to the extent modified or made applicable in regulations. The unified partnership procedures were added to the Code by section 404 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, 96 Stat. 648. The unified partnership provisions which are made applicable to subchapter S items relate to assessing deficiencies, filing claims for credit or refund, as well as judicial determination of partnership items.

Section 6231(a)(1)(B) provides that partnerships with ten or fewer partners are exempt from the unified audit and litigation procedures, so that the tax

treatment of such partnerships is determined (as in the pre-TEFRA days) at the individual partner level. Petitioner argues that this ten-person exemption provision is incorporated in the subchapter S audit and litigation provisions and that since the corporation had but three shareholders, unified treatment is inappropriate.

The Secretary issued Temporary Regulations on January 27, 1987, providing that where an S corporation consists of five or fewer shareholders, the tax treatment shall not be determined at the corporate level. The Temporary Regulations, however, are applicable only to the taxable year of an S corporation the due date of the return of which is on or after January 30, 1987. Sec. 301.6241-1T(c)(2)(i), Temporary Proced. & Admin. Regs., 52 Fed Reg. 3003 (Jan. 27, 1987). Here, we deal with adjustments for the

taxable year ended June 30, 1984. By its terms, the temporary regulation is inapplicable to the matter at bar.

Since we filed our memorandum opinion holding that individual shareholder treatment was not appropriate in this matter, the Fifth Circuit in Arenjay Corp. v. Commissioner, 920 F.2d 269 (5th Cir. 1991), revg and remanding an unreported Order of this Court, has held that the unified procedures do not apply to a subchapter S corporation with ten or fewer shareholders for those years not covered by the regulation. The Fifth Circuit incorporated the statutory ten-partner exemption in regard to partnership audits and litigation into the subchapter S procedures. Since this opinion, which reverses an unpublished Order of this Court, is in conflict with our earlier decisions in Blanco Investments & Land, Ltd. v. Commissioner, 89 T.C. 1169 (1987),

and 111 West 16 St. Owners, Inc. v. Commissioner, 90 T.C. 1243 (1988), it appears appropriate to reconsider our Memorandum Opinion in this matter, even though appeal in this case lies in the United States Court of Appeals for the Ninth Circuit. Thus, our holdings in those and other cases still have vitality in all jurisdictions with the exception of those within the Fifth Circuit. See Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971). Nevertheless, we reconsider our Memorandum Opinion in order to decide whether we will follow the rationale of the Fifth Circuit in Arenjay Corp. v. Commissioner, supra, which conflicts with its conclusion.

Section 6244 of the Code provides as follows:

> SEC. 6244. CERTAIN PARTNERSHIP PROVISIONS MADE APPLICABLE.
>
> The provisions of --

(1) subchapter C which relate to

(A) assessing deficiencies, and filing claims for credit or refund, with respect to partnership items, and

(B) judicial determination of partnership items, and

(2) so much of the other provisions of this subtitle as relate to partnership items, are (except to the extent modified or made inapplicable in regulations) hereby extended to and made applicable to subchapter S items.

It is therefore necessary to look to the provisions of subchapter C which relate to assessing deficiencies with respect to partnership items. Subchapter C provides that tax treatment of any partnership item shall be determined at the partnership level. Sec. 6221. Assessment is to be made only after the completion of partnership level proceedings. Sec. 6225. Further, judicial review is to be made on a unified basis. Sec. 6226. Contained within the provisions of subchapter C is the definition of "partnership" in section

6231(a)(1). That section provides that the term partnership means any partnership required to file a return under section 6031(a). It goes on, however, to set forth an exception for certain small partnerships with "10 or fewer partners each of whom is a natural person (other than a nonresident alien) or an estate." The Fifth Circuit in Arenjay Corp. v. Commissioner, supra, held that the same ten-person exemption was incorporated by reference in the subchapter C corporation audit and litigation procedures by section 6244.

At the time of enactment of the Subchapter S Revision Act, section 1361, which defines an S corporation, was amended to increase the possible number of shareholders of a subchapter S corporation from 25 to 35. This number was originally amended from 10 to 15 shareholders in 1978. Pub. L. 95-600, 92 Stat. 2843, and later from 15 to 25 shareholders in 1981. Pub. L.

97-34, 95 Stat. 250. Section 1361, amended at the same time as section 6244 was enacted, does not contain within its provisions any exemption for a "small" subchapter S corporation such as the partnership audit and litigation provisions contain.

The definition of what constitutes a "partnership" for TEFRA purposes as contained in section 6231(a)(1) is, of course, not relevant to the definition of subchapter S corporation, which is defined in section 1361. Whether the ten-person exemption should be grafted onto subchapter S unified proceedings can be ascertained only on review of the specific provisions of section 6244. That section provides for the incorporation of those provisions of subchapter C, first, which relate to assessing deficiencies and filing claims for credit or refund with respect to partnership items. The definition of what

constitutes a partnership for TEFRA provisions does not pertain to any of such activities. Thus, the provisions for assessing deficiencies, filing claims, etc. have nothing to do with the definition of a partnership and, similarly, nothing to do with the definition of a subchapter S corporation. These are purely procedural provisions regarding partnership audits which are incorporated by reference to subchapter S corporation audits. Second, section 6244 incorporates those provisions of subchapter C which relate to judicial determination of partnership items. This provision also, has nothing to do with incorporating the definition of a partnership for TEFRA purposes into a subchapter C judicial proceeding.

In Blanco Investments & Land, Ltd. v. Commissioner, supra at 1173, we stated:

> Section 6244 incorporates generically four categories of partnership audit

> and litigation provisions into the S corporation audit and litigation procedures: those relating to (1) assessments of deficiencies, (2) filing claims for credit or refund, (3) judicial determination of partnership items, and (4) partnership items. Section 6231(a)(1)(B) [defining a partnership for TEFRA purposes] does not relate to an assessment, refund claim, or judicial determination and, therefore, is not made applicable to S corporation audits by section 6244(1). Consequently, the small partnership exception applies to S corporation litigation only if it "relate[s] to partnership items" within the meaning of section 6244(2). [Fn. Ref. omitted.]

We accordingly refused to accept the taxpayer's contention that the ten-person partnership exemption was incorporated by section 6244 into the subchapter S corporation procedures. We went on, however, to hold that there was an exception applicable to S corporation audit and litigation procedures if it related to "partnership items" within the meaning of section 6244(2). As we noted in Blanco at

> We believe that the small partnership exception does, by definition, "relate" to partnership items. Eligibility for small partnership status turns, in part, on how the partners share partnership items. Section 6231(a)(1)(B)(i)(II) expressly provides that a necessary element of small partnership status is that each partner share in partnership items in the same proportion as that partner shares in all other items. Further, the existence of partnership items depends on the existence of a partnership. If a partnership meets the requirements for the small partnership exception of section 6231(a)(1)(B), it is not considered to be a partnership for the purposes of the partnership litigation procedures. In that event, no partnership items exist. The connection, therefore, between the small partnership exception and partnership items is direct and substantial. . . .

We have considered this aspect of our holding in Blanco, and upon reconsideration, believe we were incorrect in our view that the ten-person exemption has any relation to "partnership items." Rather that term relates to the provisions of section 6231(a) (3) which define

partnership items. That subsection provides:

> (3) Partnership item. The term "partnership item" means, with respect to a partnership any item required to be taken into account for the partnership's taxable year under any provisions of subtitle A to the extent regulations prescribed by the Secretary provide that for the purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

In our view, the definition of what relates to a partnership item refers to items of income, deductions, and credits of partnerships, rather that to what constitutes a partnership for TEFRA purposes. In the introductory paragraph of the Conference Committee report, it is stated: "the tax treatment of items of partnership income, loss,, deductions, and credits will be determined at the partnership level in a unified partnership proceeding rather than in separate proceedings with the partners." H. Rept.

No. 97-760 (Conf.) (1982), 1982-2 C.B. 600, 662. Thus, it is clear that Congress, by utilizing the term "partnership items" intended to mean items of income, loss, deductions, and credits. We do not believe that Congress intended it to incorporate the ten-person exemption for small partnerships within the ambit of that term. Further, we find nothing in the legislative history which would indicate to the contrary. To the extent that our opinion in Blanco holds to the contrary, we no longer follow that opinion. Thus we hold that the definition of partnership item does not contain within itself the ten-person exclusion or any other exclusion. We note that in Blanco, a one-shareholder subchapter S corporation, we went on to state an additional reason for our holding (at 1176):

> It is clear that interpreting the S corporation litigation procedures to

> apply to an S corporation with one shareholder would lead to a result contrary to the intent of the statute. The procedures were intended to conserve time and resources by disposing of all issues relating to an S corporation in a single proceeding. There is no need for a separate entity level proceeding for an S corporation with only one shareholder. The judicial and administrative problems that prompted Congress to enact the entity level audit and litigation procedures do not exist in the case of the single shareholder. Moreover, applying the entity level procedures to a single shareholder S corporation creates additional litigation rather than conserving time and resources.

Upon reconsideration, we also determine that we will not follow this holding. There are no exemptions written into the statutory language for subchapter S corporations based upon the number of shareholders. That Congress has chosen to leave to the discretion of the Secretary. We have just held to this effect in a Court-reviewed opinion, Eastern States Casualty Agency, Inc. v. Commissioner, 96 T.C. ___ (June 4, 1991), and we also so

hold in the matter at bar.

Following our decision in Blanco, we considered a three-shareholder subchapter S corporation (such as that at bar) in 111 West 16 St. Owners, Inc. v. Commissioner, supra. There, we once again specifically rejected the taxpayer's argument that an exception was mandated for subchapter S corporations of ten or fewer shareholders. We also declined to hold that any figure greater than the exemption of one we determined in Blanco constituted an exception to the unified procedures, holding that to be a matter for the administrator to resolve by regulations. The result we reached in 111 West 16 St. Owners, Inc. was correct; we will, however, no longer follow the reasoning contained therein. Eastern States Casualty Agency, Inc. v. Commissioner, supra.

After considering the opinion of the Fifth Circuit in Arenjay Corp. v.

Commissioner, supra, we decline to follow the reasoning of the Circuit in the case at bar. We further note that the opinion in Arenjay Corp. did not focus upon what constitutes a "partnership item" for purposes of incorporating the ten-person partnership exemption for subchapter S purposes. Accordingly, and because we find insufficient reason to address petitioner's several other requests for reconsideration, we decline to grant petitioner's motion.

An appropriate order will be issued.

UNITED STATES TAX COURT

Twenty-Three Nineteen Creekside, Inc., Michael E. Baldigo, Tax Matters Person, Petitioner

v.

Commissioner, Respondent.

Docket Nos. 2345-90, 8007-90

Memorandum Opinion

Filed December 27, 1990

BUCKLEY, Special Trial Judge: These two cases were assigned pursuant to section 7443A(b) and Rule 180 et seq.[1] for purposes of hearing respondent's motion to correct caption in docket No. 2345-90, and respondent's motion to dismiss for lack of jurisdiction in docket No. 8007-90. Since both motions revolve around the question of who was (or was not) the tax matters person

[1]All section references are to the Internal Revenue Code as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

of Twenty-Three Nineteen Creekside, Inc., a corporation, during the fiscal year ended June 30, 1984, we consider both motions in this opinion.

Respondent mailed four identical Notices of Final S Corporation Administrative Adjustment (hereafter FSAA) on December 21, 1989. The one attached to the petitions in these two cases was addressed to Michael E. Baldigo, Tax Matters Person, 30 Creekwood Square, Rohnert Park, California, in regard to a California Subchapter S corporation, Twenty-Three Nineteen Creekside, Inc. (hereafter the corporation) for the corporation's tax year ended June 30, 1984. Others were sent addressed as follows:

Tax Matters Person
Twenty-Three Nineteen Creekside, Inc.
2319 Creekside Road
Santa Rosa, CA. 95405

Tax Matters Person
Twenty-Three Nineteen Creekside, Inc.
Post Office Box 2010
Sparks, NV. 89432

Michael E. Baldigo
Post Office Box 2010
Sparks, NV. 89432

During the year ended June 30, 1984, there were three shareholders of the corporation, one of whom was Mr. Baldigo, who had a 72 per cent interest in the corporation. Alvis Rushton owned 25 percent of the corporate shares, and the remaining 3 percent was held by R.B. Loughman. On October 1, 1984, all interest in the corporation passed to Alvis M. Rushton. The return for the corporation's June 30, 1984, year was filed on March 15, 1985. The return was signed by A. M. Rushton, President and prepared by Michael E. Baldigo. The address indicated on the return was Post Office Box 2010, Sparks, Nevada.

In docket No. 2345-90, the petition was filed on February 5, 1990, by Michael

E. Baldigo for the corporation. In the body of the petition, Mr. Baldigo indicated he was not the tax matters person, and accordingly, the caption of the case was entitled Twenty-Three Nineteen Creekside, Inc. by Michael E. Baldigo, a person other than the tax matters person. This petition was filed within the 90-day period from the date of the mailing of the FSAA by respondent. It is in regard to this petition that respondent filed his motion to correct caption, to indicate that Mr. Baldigo was the tax matters person.

After the filing of the petition in docket No. 2345-90, this Court issued an order that petitioner file a Notice of Identification for Tax Matters Person, and petitioner responded by identifying the tax matters person as Alvis M. Rushton. It is the contention of Mr. Baldigo that Mr. Rushton is the tax matters person (hereafter TMP) of the corporation.

In docket No. 8007-90, a petition from the same FSAA was filed in the Court on April 27, 1990, signed by Michael E. Baldigo, a person other than Tax Matters Person erroneously served as a Tax Matters Person. This petition was filed protectively, within the statutory time period during which a person other than the TMP might file a petition with this Court. Respondent has moved to dismiss this petition for lack of jurisdiction on the ground that the TMP, Mr. Baldigo, had already filed the petition in docket No. 2345-90 with respect to the same FSAA.

Mr. Baldigo argues that respondent has sent an FSAA for the subsequent taxable year ended June 30, 1985, to Mr. Rushton as the TMP for the same corporation, and that only Mr. Rushton should be treated as the TMP for both years in controversy. Further, Mr. Baldigo alleges that Mr. Rushton executed a Form 872-R, Special

Consent to Extend the Time to Assess Tax attributable to items of an S corporation for the year ended June 30, 1984. Mr. Rushton executed the consent as president of the corporation in the space next to the printed words "Tax Matters Person Signature Here." In addition, Mr. Baldigo signed the consent in the space next to the words "Authorized Representative Sign Here." Mr. Baldigo contends that if Mr. Rushton is not the TMP the consent is invalid, and that accordingly, the statute of limitations prevents respondent from making any assessment for that year. Mr. Baldigo goes on to contend that the FSAA procedure does not apply to a subchapter S corporation with only three persons.

We deal first with the contention that the audit and litigation provisions of section 6241 et seq. do not apply to a subchapter S corporation with but three shareholders. The Subchapter S Revision

Act of 1982, Pub. L. 97-354, 96 Stat. 1669, provides, inter alia, for consideration of the tax treatment of items of subchapter S income deductions and credits in a unified proceeding rather than in separate proceedings with shareholders. Thus, section 6241 provides that the treatment of any subchapter S item shall be determined at the corporate level. Each shareholder is to be given notice of, and the right to participate in, any administrative or judicial proceeding for the determination at the corporate level of any subchapter S item. Sec. 6243. Certain of the TEFRA partnership provisions are made applicable to subchapter S items by section 6244. That section provides, in effect, that except to the extent modified or made inapplicable in regulations, the provisions of subchapter C which relate to assessing deficiencies, filing claims for credit or refund, with respect to partnership items,

as well as judicial determination of partnership items are extended to and made applicable to subchapter S items.

Section 301.6241-1T(c)(2)(ii), Temporary Proced. & Admin. Regs., 52 Fed Reg. 3003 (Jan. 27, 1987), provides that where an S corporation consists of five or fewer shareholders, the tax treatment shall not be determined at the corporate level. The Temporary Regulation, however, is applicable only to the taxable year of an S corporation when the due date of the return is on or after January 30, 1987. The adjustments at bar were for the year ended June 30, 1984, and hence the Temporary Regulation is inapplicable. We must, therefore, consider this matter in relation to earlier cases which also arose without the assistance of Treasury Regulations. We have held that the small partnership exception set forth in section 6231(a)(1)(B) was applicable to S

corporation audits by section 6244(2) so that an S corporation with only one shareholder was exempt from S corporation audit and litigation procedures. Blanco Investments & Land, Ltd. v. Commissioner, 89 T.C. 1169 (1987). In 111 West 16 St. Owners, Inc. v. Commissioner, 90 T.C. 1243 (1988), we refused to extend our Blanco holding to a three-shareholder S corporation, and held that the determination as to the qualifying number of shareholders for the S corporation exception was an administrative function. Compare Miller v. United States, 710 F.Supp. 1377 (N.D. Ga. 1989). Accordingly, we hold that in the case at bar, where the year in question ends June 30, 1984, the S corporation audit and litigation provisions are applicable to this corporation which had three shareholders. Therefore, the subchapter S items will be considered at the corporate level, rather than at

shareholder levels.

We turn now to determine who is the tax matters person of the corporation. First, we point out that it is clear that Mr. Rushton executed the tax return for the year in issue as "President." Further, he also signed the Form 872-R Special Consent as President of the corporation in the space next to the words "Tax Matters Person Signature Here." In addition, the record indicates that the report on the examination of the corporation for its fiscal years ended June 30, 1984 and 1985 was addressed by respondent to Alvis Rushton, Tax Matters Person. Mr. Baldigo contends that Mr. Rushton is the TMP for the corporation; respondent contends that Mr. Baldigo, who had the largest shareholder interest, is the TMP.

TEFRA partnership provisions were made applicable to subchapter S items for tax years beginning after December 31, 1982,

"except to the extent modified or made inapplicable in regulations." Sec. 6244. To date, the Secretary has not set forth by regulations the manner in which designation of a TMP is to be made. Accordingly, the provisions of section 6231(a)(7) regarding partnership designation of a tax matters partner apply through the incorporating provisions of section 6244. Section 6231(a)(7) defines a tax matters partner of any partnership as (a) the general partner so designated or (b) lacking such designation, the general partner with the largest profits interest. There has been no designation of a TMP by the shareholders in this matter. Petitioner's contention that respondent in effect has chosen a TMP by addressing mail to Mr. Rushton as tax matters person is incorrect. The record does not show that the Secretary selected Mr. Rushton as the TMP for the corporation's tax year ended June 30, 1984.

In the case at bar, none of the corporation's shareholders have made an attempt at a designation of a TMP for the year ended June 30, 1984. In such a posture, it is clear that the shareholder with the largest stock interest shall be considered the TMP for the corporation. That person is Michael Baldigo, the holder of 72 percent of the corporate shares for that year.

Accordingly, respondent's motion to correct caption docket No. 2345-90 will be granted to show Michael E. Baldigo as Tax Matters Person. Further, respondent's motion to dismiss for lack of jurisdiction the petition filed at docket No. 8007-90 is denied, but the petition will be dismissed for duplication as a petition has previously been filed by the TMP in docket No. 2345-90.

Petitioner asks us to consider the validity of the Form 872-R consent executed

by Mr. Rushton. We decline to do so in regard to these motions. That matter can be raised by petitioner at trial herein. Further, we reject out-of-hand Mr. Baldigo's contention that the FSAAs were invalid because of the purported failure of the Internal Revenue Service to make full payment to the U.S. Postal Service for certified mailing fees.

Appropriate orders will be issued in each docket.

Title 26 - Internal Revenue Code

Subchapter D -
Tax Treatment of Subchapter S Items

. . .

"26 U.S.C. § 6244. Certain partnership provisions made applicable.

"The provisions of --

(1) subchapter C which relate to

(A) assessing deficiencies, and filing claims for credit or refund, with respect to partnership items, and

(B) judicial determination of partnership items, and

(2) so much of the other provisions of this subtitle as relate to partnership items, are (except to the extent modified or made inapplicable in regulations) hereby extended to and made applicable to subchapter S items."

. . .

Subchapter C -

Tax Treatment of Partnership Items

"26 U.S.C. § 6229. Period of limitations for making assessments.

(b) Extension by agreement. -

(1) In general. - The period described in subsection (a) (including an extension period under this subsection) may be extended -

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before expiration of the period.

"26 U.S.C. § 6231. Definitions and special rules.

(a) Definitions.

For the purposes of this subchapter -

(1) Partnership

(A) In general. Except as provided in subparagraph (B), the term 'partnership' means any partnership required to file a return under section 6031(a).

(B) Exception for small partnerships.

(i) In general. The term 'partnership' shall not include any partnership if --

(I) such partnership has 10 or fewer partners each of whom is a natural person (other than a nonresident alien) or an estate, and

(II) each partner's share of each partnership item is the same as every other item.

For the purposes of the preceding sentence, a husband and wife (and their estate) shall be treated as 1 partner.

(ii) Election to have subchapter

apply. A partnership (within the meaning of subparagraph (A) may for any taxable year elect to have clause (i) not apply. Such election shall apply for such taxable year and all subsequent taxable years unless revoked with the consent of the Secretary.

(2) Partner. The term "partner" means-

(A) a partner in a partnership, and

(B) any other person whose income tax liability under subtitle A is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership.

(3) Partnership item. The term 'partnership item' means, with respect to a partnership any item required to be taken into account for the partnership's taxable year under any provisions of subtitle A to the extent regulations prescribed by the Secretary provide that for the purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

(4) Nonpartnership item. The term 'nonpartnership item' means an item which is (or is treated as) not a partnership item.

. . .

(7) Tax Matters Partner. The tax matters partner of any partnership is --

(A) the general partner designated as the tax matters partner as provided in the regulations, or

(B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 or such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters person.

. . .

(c) Regulations with respect to certain special enforcement areas.

. . .

(2) Items may be treated as nonpartnership items.
To the extent that the Secretary determines and provides by regulations that to treat items

as partnership items will interfere with the effective and efficient enforcement of this title in any case described in paragraph (1), such items shall be treated as nonpartnership items for purposes of this subchapter."

"26 C.F.R. § 301.6229(b)-1T. **Extension by agreement (temporary).**

Any partnership may authorize any person to extend the period described in section 6229(a) with respect to all partners by filing a statement to that effect with the service center with which the partnership return is filed. The statement shall -

(a) Provide that it is an authorization for a person other than the tax matters partner to extend the assessment period with respect to all partners,

(b) Identify the partnership and the person being authorized by name, address, and taxpayer identification number,

(c) Specify the partnership taxable year or years for which the authorization is effective, and

(d) Be signed by all persons who were general partners at any time during the

year or years for which the authorization is effective."

"26 C.F.R. § 301.6231(a)(7)-1. **Designation of tax matters partner (temporary).**

. . .

(m) Tax matters partner where no partnership designation made - (1) In general. The tax matters partner for a partnership taxable year shall be determined under this paragraph (m) if:

(i) The partnership has not designated a tax matters partner under this section for that taxable year; or

(ii) The partnership has designated a tax matters partner under this section for that taxable year, that designation has been terminated under paragraph (1) of this section, and the partnership has not made a subsequent designation under this section for that taxable year,

(2) General partner having the largest profits interest is the tax matters partner. The tax matters partner for any partnership taxable year to which this paragraph (m) applies is the general partner having the largest profits interest in the partnership at the close of that taxable year (or where there is more than one such partner, the one of such partners whose name would appear first in an alphabetical listing). For the purposes of this paragraph (m)(2), all limited partner-

ship interests held by a general partner shall be included in determining that general partner's profits interest in the partnership."

. . .

"26 C.F.R. § 301.6241-1T. **Tax treatment determined at corporate level (Temporary).**

. . .

(c) S corporation - (1) For the purposes of subchapter D of chapter 63 of the Code, except as provided in paragraph (c)(2) of this section, the term "S corporation" means any corporation required to file a return under section 6037(a).

(2) Exception for small S corporations - (i) Effective date. This paragraph (c) (2) shall apply to any taxable year of an S corporation the due date of the return for which (determined without regard to extensions) is on or after January 30, 1987.

(ii) Five or fewer shareholders. For purposes of this paragraph (c), an S corporation shall not include a small S corporation. A small S corporation is defined as an S corporation with 5 or fewer shareholders, each of whom is a natural person or an estate. . . ."

. . .

"Subchapter D -

Tax Treatment of Subchapter S Items

"26 U.S.C. § 6241. Tax treatment determined at the corporate level.

Except as otherwise provided in regulations prescribed by the Secretary, the tax treatment of any subchapter S item shall be determined at the corporate level.

"26 U.S.C. § 6242. Shareholder's return must be consistent with corporate return or Secretary notified of inconsistency.

A shareholder of an S corporation shall, on such shareholder's return, treat a subchapter S item in a manner which is consistent with the treatment of such item on the corporate return unless the shareholder notifies the Secretary (at the time and in the manner prescribed by regulations) of the inconsistency.

"26 U.S.C. § 6243. All shareholders to be notified of proceedings and given opportunity to participate.

In the manner and at the time prescribed in the regulations, each shareholder in a corporation shall be given notice of, and the right to participate in, any administrative or judicial proceeding for the determination at the corporate level of any subchapter S item.

"26 U.S.C. § 6244. Certain partnership provisions made applicable.

The provisions of-

(1) subchapter C which relate to-

(A) assessing deficiencies, and filing claims for credit or refund, with respect to partnership items, and

(B) judicial determination of partnership items, and

(2) so much of the other provisions of this subtitle as relate to partnership items, are (except to the extent modified or made inapplicable in regulations) hereby extended to and made applicable to subchapter S items.

"26 U.S.C. § 6245. Subchapter S item defined.

For purposes of this subchapter, the term "subchapter S item" means any item of an S corporation to the extent regulations prescribed by the Secre-

tary provide that, for the purposes of this subtitle, such item is more appropriately determined at the corporate level than at the shareholder level."

Supreme Court, U.S.
FILED
JAN 23 1996

No. 95-1023

In the Supreme Court of the United States

OCTOBER TERM, 1995

TWENTY-THREE NINETEEN CREEKSIDE, INC., MICHAEL E. BALDIGO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
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(202) 514-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a corporation with three shareholders, elected to be taxed as an "S corporation" under Subchapter S of the Internal Revenue Code, 26 U.S.C. 1361-1379. Petitioners challenge certain adjustments made by the Commissioner of Internal Revenue to its return for the taxable year ending June 30, 1984.

1. This is a companion case to *Alvis M. Rushton* v. *Commissioner of Internal Revenue*, No. 95-846. The petitioner in *Rushton* also sought review of the adjustments to the corporation's return for the taxable year ending June 30, 1985. For the reasons stated in the brief in opposition to the petition for a writ of

certiorari in the *Rushton* case, which was filed on December 28, 1995, the petition in this case should also be denied.*

2. Petitioner's further contention (Pet. 14-17) that Michael E. Baldigo was not the tax matters person of Creekside provides no basis for further review. Petitioner's contention is based on the fact that another individual, Alvis M. Rushton, held 100 percent of the shares in Creekside as of October 1, 1984 (Pet. 15).

Pursuant to Section 6231(a)(7)(B) and 6244 of the Internal Revenue Code, the tax matters person of a Subchapter S corporation is either the shareholder designated by the corporation or, in the absence of such a designation, the shareholder "having the largest profits interest in the [corporation] at the close of the taxable year involved" (26 U.S.C. 6231(a)(7)(B)). The term "taxable year" is defined as "the calendar year, or the fiscal year ending during such taxable year, upon the basis of which the taxable income is computed under subtitle A [Income Taxes]." 26 U.S.C. 7701(a)(23). The term "fiscal year" is defined as "an accounting period of 12 months ending on the last day of any month other than December." 26 U.S.C. 7701(a)(24).

It is undisputed that petitioner filed its tax return for 1984 on the basis of a fiscal year ending June 30, 1984, that it did not designate a tax matters person for that taxable year, and that Baldigo owned 72 percent of the shares in Creekside at all times during the taxable year (Pet. App. A6-A7, A43). The court of appeals correctly looked to the close of Creekside's fiscal year ending June 30, 1984, to determine the tax

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* We are providing a copy of the brief in opposition filed in No. 95-846 to petitioner.

matters person, and the court correctly identified Baldigo as the person having the largest profits interest on that date (Pet. App. A6-A9). Baldigo's subsequent sale of his entire interest to Rushton on October 1, 1984, occurred during Creekside's *1985* fiscal year (*id.* at A3, A7) and is therefore irrelevant to the determination of the tax matters person for the 1984 taxable year.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

JANUARY 1996